BRB No. 06-0186 BLA

ALVERNON RANDOLPH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 09/22/2006
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (04-BLA-5959) of Administrative Law Judge Robert L. Hillyard rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge found, in accordance with the parties' stipulation, that claimant had thirty-three years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] Decision and Order at 2 n. 3, 3; Director's Exhibit 2; Hearing Transcript at 7-

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of

8. The administrative law judge found that the medical evidence established the existence of pneumoconiosis and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge further found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant established the existence of pneumoconiosis at Section 718.202(a)(1),(a)(4). Additionally, employer argues that the administrative law judge erred in finding that Dr. Simpao's report established total disability and total disability due to pneumoconiosis pursuant to Section 718.204(b)(2)(iv),(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Worker's Compensation Programs, has not participated in this appeal. Employer has filed a reply to claimant's response.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge considered six readings of two x-rays in light of the readers' radiological qualifications and found that the existence of pneumoconiosis was established. Decision and Order at 4, 7-8; Director's Exhibits 10-12; Claimant's Exhibit 1; Employer's Exhibits 1-2. Employer asserts that the administrative law judge erred in crediting Dr. Brandon's positive reading over the negative reading by Dr. Spitz of the March 17, 2003 x-ray. The administrative law judge credited Dr. Brandon's positive readings of the March 17, 2003, x-ray, and the May 17, 2004, x-ray, which Dr. Repsher interpreted as negative, because Dr. Brandon is

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the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

a dually qualified Board-certified radiologist and B-reader, whereas Dr. Spitz and Dr. Repsher are both only B readers. Decision and Order 4, 8.

Employer contends that the administrative law judge failed to consider Dr. Spitz's qualification as a Board-certified radiologist as indicated on the reading where Dr. Spitz checked a box designated "CERTIFIED B-READER." Director's Exhibit 12. The term "certified B-reader" denotes a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. This term does not establish Board certification as a radiologist as employer suggests.[2] Employer's Brief at 6-7; *see* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Contrary to employer's allegation of error, there is no evidence in the record establishing that Dr. Spitz was a dually qualified physician at the time he rendered the x-ray interpretations that were in the record. Furthermore, the administrative law judge was not required to refer to sources outside the record to ascertain whether this physician was a Board-certified radiologist when he read the x-rays in question since the party seeking to rely on an x-ray interpretation bears the burden of establishing the qualifications of the reader. *Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54 (1985).

However, as employer acknowledges, Dr. Spitz's full resume was not entered into the record, but a review of the exhibit reflects that Dr. Spitz listed "professorship in radiology" below his signature. We also reject employer's implication that Dr. Spitz's additional qualification as a professor of radiology mandates that his readings be given the greatest weight. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-56 (2004)(*en banc*)); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003);. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). However, Section 718.202(a)(1) specifically provides that where two or more x-ray readings are in conflict, the administrative law judge shall consider the radiological qualifications of the x-ray readers, as defined therein, in evaluating their x-ray interpretations. 20 C.F.R. §718.202(a)(1)(ii)(C)-(F). The regulations provide only the criteria for determining whether a reader is Board-certified, Board-eligible, a B reader, or a qualified radiologic technologist, and do not explicitly provide for the consideration of additional qualifications, such as professorships. We note, however, that the comments to the revised regulations specifically state that in considering the radiological qualifications of a reader, the adjudicator "should consider any relevant factor in assessing a physician's

[2] *Board-certified* means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(1)(ii)(C).

credibility, and each party may prove or refute the relevance of that factor." 65 Fed. Reg. 79945 (Dec. 20, 2000), *citing Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983). Therefore, we vacate the administrative law judge's finding that the evidence established the existence of pneumoconiosis at Section 718.202(a)(1) and, on remand, the administrative law judge is instructed to consider this qualification, as it may bear on the quality of the x-ray evidence, as well as to conduct both a qualitative and quantitative review of the x-ray evidence by considering both the number of positive and negative x-ray readings and the radiological expertise of the readers. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring); *Harris v. Old Ben Coal Co.***,** 23 BLR 1- 98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

Employer next contends that the administrative law judge erroneously found the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Employer specifically contends that the administrative law judge failed to explain how the objective evidence supported Dr. Simpao's diagnosis of pneumoconiosis. We agree. The administrative law judge indicated that Dr. Simpao's diagnosis was based on "an abnormal chest x-ray, pulmonary function test, and physical findings." Decision and Order at 10. The administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis constituted a documented and reasoned medical opinion because the physician relied upon his own positive x-ray interpretation, the x-ray evidence as a whole was positive, and the doctor's diagnosis was "supported by the objective evidence of record." *Id.* Other than a restatement of his own positive x-ray interpretation, it is unclear how the other evidence supported Dr. Simpao diagnosis, and we agree with employer that the administrative law judge did not explain his finding. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). In light of our determination to vacate the administrative law judge's finding that the x-ray evidence is positive, we also must vacate the administrative law judge's finding that the existence of pneumoconiosis was established by the medical opinions and instruct the administrative law judge to reevaluate the opinions on remand. Moreover, the administrative law judge is instructed to explain how the objective evidence supports the physicians' diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155.

Additionally, we will address employer's argument that the administrative law judge erred in rejecting Dr. Repsher's opinion on the basis that his "report fails to provide an explanation for why he ruled out coal dust as a cause of the Claimant's COPD." Employer's Brief at 9. Employer contends that since the administrative law judge did not determine that claimant suffers from "legal" pneumoconiosis and it is claimant's burden to establish the elements of entitlement the administrative law judge's reasoning is erroneous. Decision and Order at 10; *see Williams*, 338 F.3d 501, 22 BLR 2-625. We find merit in employer's contention. Dr. Repsher explained his diagnosis of mild COPD

due to smoking, and not coal dust, because claimant "has pulmonary function test evidence of mild to moderate obstructive ventilatory impairment, with normoxemia and no restrictive ventilatory impairment." Employer's Exhibit 2. However, the administrative law judge did not address whether the medical opinions established the existence of legal pneumoconiosis.[3] 20 C.F.R. §718.201. In light of the foregoing inconsistency, the administrative law judge is instructed to reconsider the medical opinions and determine whether claimant has established the existence of clinical or legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Employer next contends that the administrative law judge erred in crediting Dr. Simpao's medical opinion in finding that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge credited Dr. Simpao's opinion that claimant was totally disabled as well documented, well reasoned, and supported by objective evidence, noting that the physician based his finding on an abnormal x-ray, EKG, pulmonary function testing, symptoms, and physical findings which included increased palpation, increased percussion, and crepitation auscultation. Decision and Order at 12. Employer argues that Dr. Simpao noted claimant's position as a maintenance worker in a preparation plant, and apparently based his opinion that claimant was unable to perform his former coal mine work on his examination, claimant's history, and objective test results. Employer argues, however, that Dr. Simpao's opinion is undermined by his failure to state claimant's specific job duties, and by his description of claimant's impairment as moderate. Employers Exhibit 1 at 13; *see Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We find merit in employer's contention since Dr. Simpao testified that he was not familiar with the specific physical requirements of claimant's job. Employer's Exhibit 1 at 13; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). We, therefore, vacate the administrative law judge's finding at Section 718.204(b)(2)(iv), as well as his conclusion that claimant established total disability based on a weighing of the totality of the relevant evidence at Section 718.204(b)(2).

Employer next asserts that the administrative law judge erred by finding the report of Dr. Simpao, attributing claimant's total respiratory disability to his pneumoconiosis, well reasoned and documented, arguing that the administrative law judge did not evaluate whether the physician explained how his documentation supported his conclusion. Employer's Brief at 17; *see* Decision and Order at 13-14; Director's Exhibit 10; *see also*

[3] "Legal pneumoconiosis" includes any *chronic* lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2)(emphasis added).

Gross v. Dominion Coal Corp., 23 BLR 1-8 (2003); *Trumbo*, 17 BLR 1-85. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis and total disability were established, we also vacate the administrative law judge's finding pursuant to Section 718.204(c), and instruct him to revisit this issue on remand, if reached.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge